No. 20 of 1952.

IN THE HIGH COURT OF AUSTRALIA

VOYNOVICH

V.

VOYNOVICH

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on TUESDAY, 7th OCTOBER, 1952.

J. J. Gourley, Govt. Print., Melb.

C.7163/51

VOYNOVICH

v.

VOYNOVICH

JUDGMENT :

DIXON C.J.
WILLIAMS J.
FULLAGAR J.
KITTO J.
TAYLOR J.

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This is an appeal from an Order made by His Honour Mr. Justice Gavan Duffy upon the hearing of a summons under Section 20 of the Married Women's Property Act, 1928. The husband took out the summons to which his wife is the respondent. She is the appellant in this Court. The question in dispute to the solution of which the summons was directed arose from the ownership of a piece of land. The wife had previously been married and had been divorced. She and her former husband were joint tenants of a piece of land. After her divorce she was married to the applicant in the summons on the 19th May, 1948. Shortly after the marriage a question arose between her then husband, the applicant in the summons, and herself, as to the acquisition of the undivided half share of her former husband in the piece of land which she held as joint tenant with him. The up-shot was that he found £150 for the purpose. That sum of money was paid to the former husband and a transfer of the undivided half interest was made into her name. It is not quite clear whether the sum of money was paid to her and she became a party to the transaction with her former husband or whether her new husband was a party to the transaction with the former husband but directed that the half share should be transferred to her. On that piece of land a dwelling house was built, I will not say by their joint efforts, but rather by their joint efforts at first and then by their successive efforts. They separated before the

house was completed. A good deal of bitterness arose between them and in the end the husband made the application under the Married Women's Property Act for a declaration that he was entitled to an undivided half share in the piece of land to which I have referred. His Honour, having heard the summons upon affidavit evidence and upon evidence given by the parties on their oral examination, made an order declaring simply that the applicant is entitled to a half share in the net proceeds of the sale of the property, the subject matter of the present dispute. The proceeds of the property amounted to the sum of £3,571.18.11, and was held jointly by the solicitors for the applicant and the respondent respectively in a certain bank. The property was, in fact, sold immediately after the issue of the summons and the net sum of money it raised was that amount, which is mentioned in the order. It is necessary now to turn to the building. The building was begun at a time when the wife and husband were living temporarily in a restored amity. He found a sum of money for the purposes of erecting the building. In his affidavit he says that he paid £150 for the land, the sum which I have already mentioned, and £690 which he spent on the house, and that he expended labour consisting of building fences and putting in foundations to the value of £120, making in all a total of £960. I should add that at the point of their separation, he desisted from going on with the building. His wife then raised sufficient money from a bank to proceed with the building and she borrowed a further sum of money and incurred liabilities in a large amount. She raised from a bank a sum of £1,150, she borrowed another sum of £350, and she incurred liabilities to the extent of £1,100. The decision of the learned Judge was placed on a finding that there was an express agreement. His Honour referred to cases which deal with the presumption of advancement and the possibility of a trust resulting on the displacement of that presumption being displaced. Then he says : "I do not think this is a case where the learning on what inferences are to be drawn from payments made by a husband to relieve his wife's property or to help her to acquire property can be helpful, since here I find an express contract

between the parties, and I have merely to determine what results flow from it". The express contract to which he refers, he described in an earlier part of his judgment. His Honour says: "She wished to buy out her ex-husband's share and shortly after their marriage she and the applicant agreed that the applicant should pay £150 for the former husband's half share, and that if she sold the property, and she said there was a buyer in prospect, she would repay the £150 to the applicant, and if not, they would build a house on it and own it between them". His Honour then at a later part of his judgment, discusses the consequences of the agreement which he found. The learned Judge says : "The real question here is whether the agreement between them should be treated as meaning that when the house was built they should own it in shares equivalent to the amount each had contributed, or that they were to pool such resources as they could command to build the house and share it equally between them when built. They were then a husband and wife, very close to the date of their marriage, and if not on the best of terms, at any rate not so bitter to one another as they afterwards became, and the house was intended as a house for them. On the whole, therefore, I think I should read the agreement as meaning that they were to pool their efforts and resources and get a home which should belong to them equally."

When the order was made the wife appealed to this Court. The ground upon which the appeal has been supported is that there was not sufficient evidence to warrant the finding of the learned Judge that such an agreement was made as His Honour described or that the agreement had the meaning and effect which His Honour attributed to it. With that contention we agree.

One curious feature of the case is that while His Honour preferred to accept the evidence of the husband rather than that of the wife, the wife's evidence actually contains scraps of evidence which might have been regarded as having a somewhat greater tendency to support His Honour's conclusion than the evidence His Honour actually preferred to accept.

The evidence upon which His Honour based his judgment

is contained partly in a paragraph of the husband's affidavit and partly in his oral evidence. In a paragraph in his affidavit he describes how shortly after the marriage he paid the sum of £150 to the previous husband and placed the title of the land, at the request of his wife, in her sole name. He said his wife wanted to build a house on the land and that he wanted to buy an orchard, but finally, he agreed to build a house and at this time his wife said "that if at a later date I found a suitable orchard, we could sell the house." In his oral evidence he says: "I paid £150 in October, 1948, by cheque. It was to buy the first husband's share in the land. My wife said her uncle was anxious to buy it and if she sold it she would give me my money back and if not, we could build a house in partnership. I agreed". He goes on to say : "Up to that time and since we married my wife and I were quarrelling. We were not very happy. It did not pay to be more friendly with my wife. She did not thank me for it. I had a good few pounds more than the £150 - over £1,000. I did it because I thought we might want a home some time. I first asked that the title should be in our joint names after we put in the foundations. She agreed to do so. As soon as the building was up she refused".

The evidence which I have read does not appear to us to support the conclusion that there was at, or about that time, any agreement that the land and the house which was built upon it should belong to them in equal proportions or equal shares, quite independently of the amount of money each put into the building of the house. On the contrary, the evidence seems rather to point to the conclusion that she was placing before him the possibility of her uncle buying the undivided share still in her former husband's name or perhaps both undivided shares, and saying that if he would provide the money to get in her former husband's undivided share she would give him the money back, and then going on to suggest the possibility of their combining in some way undefined, to build a house, if afterwards they should see fit to do so. That is evidence, which so far from supporting His Honour's conclusion that they were agreeing by express contract to

join in the acquisition of land and the building of the house which they should own in individed shares, suggests rather that he was to find the money by which the entirety of the land was to become hers and that it was on terms which would entitle him to repayment. The suggestion that they should build a house on the land themselves "in partnership" if the uncle did not buy the land never reached any sufficient certainty to become a binding contract, and the manner in which the house was eventually built first by him and then by her, after he had refused to proceed further, did not at all accord with this suggestion. She contributed far more than he did towards the building of the house. The order which His Honour made would leave her nevertheless in an extremely unfavourable position.

Putting aside the alleged agreement as not being supported by the evidence, the case is then left briefly in this position. The wife, being entitled to an undivided share of the land, acquires, with the aid of the husband's money, the other undivided share. The husband does not intend that the wife shall have the full benefit of a gift of that half share of the land." He does intend that he shall have some right in respect of the money he has paid, a right to recoupment. The building is then begun on the land. She completes it by borrowing upon her own credit and incurring heavy liabilities. Each contributes money towards it. The legal title of the land is in the wife's name. There is, of course, the initial presumption of advancement and we do not think that it was the husband's intention, when the undivided half interest of her former husband in the land was transferred into her name, that she should hold it as a trustee for him, the husband. But so far as the money is concerned the presumption of advancement is rebutted. The husband never intended to make a present to his wife of any moneys he put into the land or buildings. That means, and it is the general sense of their common intention which we think is to be collected from the whole evidence, that he intended to claim a right to recoupment and therefore to have a charge upon the land which stood in her name, including, of course, the building. The charge

certainly covers the sum of £840, made up of the £150 which he originally found and the £690 which he put into the building of the house. It is suggested that he is also entitled to a charge for the value of his labour, which he assessed at £120. We do not think that is so. The labour which he chose to expend in working about the place stands on an entirely different footing from the money which he actually contributed. Our conclusion is that the order should be discharged and that there should be substituted for it a declaration that the wife was entitled to the entirety of the land, subject to a charge in his favour for £840. As the land has been realized since the issue of the summons the charge for £840 will be upon the proceeds, namely £3,571.18.11 held jointly by the respective solicitors for the parties in the bank referred to and the order will so declare.

I now deal with the costs of the appeal. We have had a good deal of difficulty as to the order we should make with respect to costs. At one stage of the controversy between the parties, an agreement was drawn up by the husband's solicitor and the husband signed it, but she refused to do so. That agreement would have given him £820, and if the wife too had signed it, she would then have been perhaps £20 better off than she is by this order. But the result would have been substantially the same as the order we make produces. Moreover, in the Supreme Court, she took up the position that her husband was entitled to nothing. On the other hand the order made by the Supreme Court is very unfavourable to her. To relieve herself from it she had no recourse but to appeal. So far as this appeal is concerned, there is nothing which can be ascribed to her to deprive her, as the successful party, of the costs of this part of the litigation. On the whole we think that the right order to make is that the appeal be allowed with costs and a declaration made to the effect I have stated. The order which we set aside contains no order as to the costs of the summons, and we propose to follow the same course and give no costs of the summons in the Supreme Court. The order, therefore, will be that the appeal be allowed with costs. The declaration and order made by

His Honour Mr. Justice Gavan Duffy will be set aside, and in lieu thereof, it will be ordered and declared on the summons that the respondent to the summons, that is the appellant in this Court, is entitled to the proceeds of the entirety of the land, subject however to an equitable charge in favour of the applicant in the summons, that is the respondent in this Court, for the sum of £840 upon the net proceeds of the sale of the land.